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No. 84-389

In the Supreme Court of the United States

OCTOBER TERM, 1984

W. HENSON MOORE, U.S. REPRESENTATIVE, SIXTH DISTRICT, LOUISIANA, ET AL., PETITIONERS

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT E. KOPP
LEONARD SCHAITMAN
DOUGLAS LETTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners' status as Members of the United States House of Representatives entitled them to challenge the constitutionality of an Act of Congress on the ground that it was a "Bill[] for raising Revenue" that did not "originate in the House of Representatives" (Art. I, Sec. 7, Cl. 1), when the House passed the bill over petitioners' opposition and despite their repeated constitutional objections.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 733 F.2d 946. The opinion of the district court (Pet. App. 38a-46a) is reported at 553 F. Supp. 267.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1984. A petition for rehearing was denied on June 29, 1984. The petition for a writ of certiorari was filed on September 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1981, H.R. 4961, a bill entitled the Miscellaneous Revenue Act of 1981, was introduced in the House of Representatives during the 97th Congress. Pet.

App. 39a. As introduced, the bill contained several provisions amending the Internal Revenue Code. On December 14, 1981, H.R. 4961 was reported out of the House Committee on Ways and Means with certain additions,[1] and it was passed by the House on the following day. 127 Cong. Rec. H9607-H9617 (daily ed. Dec. 15, 1981). The Congressional Budget Office cost estimate on H.R. 4961 was that the immediate effect of the bill would be a net reduction in tax revenues. H.R. Rep. 97-404, 97th Cong., 1st Sess. 41-43 (1981).

H.R. 4961 was referred to the Senate Finance Committee and was reported out of that Committee on July 12, 1982, with extensive amendments. It passed the Senate with further amendments on July 19, 1982. 128 Cong. Rec. S5877-S8644 (daily ed.). The bill as amended by the Senate was expected to increase tax revenues significantly over a five-year period. See S. Rep. 97-494, 97th Cong., 2d Sess. 100-106 (1982). Because of the differences between the bill as passed by the Senate and as passed by the House, the Senate requested a conference. 128 Cong. Rec. S9307, H4776 (daily ed. July 28, 1982).

In response to the Senate's request, petitioner Representative Rousselot offered a "privileged resolution" (H.R. Res. 541, 97th Cong., 2d Sess. (1982)) regarding the bill's

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[1]All but one of the bill's sections concerning tax provisions had already been the subject of hearings in conjunction with previously introduced House bills. See *Legislative Proposals Relating to Section 280A and Other Minor Tax Bills: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. H9610 (daily ed. Dec. 15, 1981) (remarks of Rep. Rostenkowski).

validity under the Origination Clause of the Constitution,[2] and sought its immediate consideration. 128 Cong. Rec. H4776 (daily ed. July 28, 1982). The resolution stated in full:

> *Resolved,* that the Senate Amendments to the bill, H.R. 4961, in the opinion of the House, contravene the first clause of the seventh section of the first article of the Constitution of the United States, and are an infringement of the privileges of this House and that the said bill, with amendments be respectfully returned to the Senate with a message communicating this resolution.

A motion to table the resolution was made immediately and was adopted on a roll call vote of 229 to 169. *Ibid.* All the petitioners, who were members of the House of Representatives, participated in the vote on the resolution and voted on the losing side. *Id.* at H4776-H4777.

Chairman Rostenkowski of the House Ways and Means Committee then moved, at the Committee's direction, to take H.R. 4961 from the Speaker's desk and to agree to the conference requested by the Senate. 128 Cong. Rec. H4777 (daily ed. July 28, 1982). The members of the House debated this motion and further considered whether the Senate-amended bill was in compliance with the Origination Clause. *Id.* at H4777-H4786. During the debate, various Representatives (including four of the petitioners) opposed the conference motion on constitutional grounds. See *id.* at H4778-H4779 (remarks of Rep. Moore); *id.* at H4781 (remarks of Rep. Rousselot); *id.* at H4781-H4782 (remarks of Rep. Crane); *id.* at H4783 (remarks of Rep.

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[2]The Origination Clause (Art. I, § 7, Cl. 1) states: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

Martin). A roll call vote was taken, and the motion to send the bill to conference was passed by a vote of 208 to 197. *Id.* at H4786-H4787. Again, each petitioner voted but was on the losing side. *Ibid.*[3] Over the next two weeks, several House Members raised the Origination Clause issue at various times. See 128 Cong. Rec. E3636-E3637 (daily ed. Aug. 3, 1982) (statements of Rep. Bereuter); *id.* at E3807 (daily ed. Aug. 11, 1982) (statement of Rep. Dreier); *id.* at E3888 (statement of Rep. Porter).

When the Conference Report on this legislation (H.R. Conf. Rep. 97-760, 97th Cong., 2d Sess. (1982)) was presented to the House, the question of compliance with the Origination Clause was again raised and debated. Petitioner Representative Moore informed his colleagues that he had filed this action in the United States District Court for the District of Columbia challenging the validity of the bill (128 Cong. Rec. H6366 (daily ed. Aug. 18, 1982)), and Representative Paul indicated that he intended to file a similar suit. *Id.* at H6368. These statements were noted and discussed. See *id.* at H6555 (daily ed. Aug. 19, 1982) (remarks of Rep. Rostenkowski); *id.* at H6561 (remarks of Rep. Gradison).

Before the House turned to the Conference Report, on August 19, 1982, petitioner Representative Rousselot once more introduced his resolution stating that H.R. 4961 contravened the Origination Clause. 128 Cong. Rec. H6528 (daily ed.). The House again voted to table this resolution. All petitioners voted against the motion to table. *Id.* at H6528-H6529. Following debate on both the merits of the

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[3]Another roll call vote followed immediately on a motion to instruct the House conferees. Petitioners all voted on this proposition (some for and some against), and the motion passed 299 to 89. 128 Cong. Rec. H4787-H4788 (daily ed. July 28, 1982).

bill and the Origination Clause issue, the House agreed to the Conference Report, with all petitioners voting against it. *Id.* at H6635-H6636.

The Senate also agreed to the Conference Report and passed the bill on that same day. 128 Cong. Rec. S10945-S10946 (daily ed. Aug. 19, 1982). The bill was then signed by the Speaker of the House pro tempore and the President of the Senate pro tempore and was certified by the Clerk of the House of Representatives as having "originated in the House of Representatives" (C.A. App. 269, 270). The President signed the bill into law on September 3, 1982 as the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324.

2. Petitioners, all of whom were members of the House of Representatives during the 97th Congress,[4] sued the House, the President of the Senate, the Clerk of the House, and the Secretary of the Senate. They alleged that H.R. 4961 violated the Origination Clause because it arose in the House as a bill to lower tax revenues but was amended in the Senate to become a bill increasing revenues.

Petitioners claimed that they were injured as members of the House (and certain of them as members of the House Ways and Means Committee) through "interference with the performance of their legislative duties in connection with the origination of bills for raising revenue and their sworn duty to support the Constitution * * *, and injury to them individually and derivatively as members of the House by abrogation of the privilege and duty of the House under

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[4]One of the original plaintiffs, Representative Williams, is no longer participating in this case. Four of the petitioners (Reps. Santini, Rousselot, Evans, and Jeffries) were not reelected to the 98th Congress. Petitioners Levitas, Martin, and Daniel Crane were not reelected to the 99th Congress.

the Constitution to originate all bills for raising revenue" (C.A. App. 19).[5] The United States intervened in the suit because the constitutionality of an Act of Congress was being challenged.[6]

The district court dismissed the complaint, holding that petitioners "lack standing to maintain th[is] action[]" (Pet. App. 39a; footnote omitted). The district court reasoned as follows (*id.* at 43a-44a; citations omitted):

> As the legislative history plainly reflects, [petitioners] had ample opportunity to exercise their voting rights and in fact * * * voted their disapproval of TEFRA at every turn. [Petitioners] fully participated in the legislative process which culminated in the passage of the act they now challenge. They were simply outvoted. The argument that [petitioners'] votes were effectively nullified by the Senate's usurpation of their right to originate revenue raising bills, and the House acquiescence therein, is unpersuasive. * * * [W]here, as in this case, "Congress itself, and not the Executive, renders any individual legislator's vote ineffective, the courts have no role." * * *
>
> In short, plaintiffs speak as a frustrated minority. Unless the institution of Congress itself has suffered injury-in-fact at the hand of the Executive, an individual legislator has no standing to complain of impairment to the effectiveness of his vote. * * * Here, Congress specifically considered and rejected the suggestion

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[5]Representative Paul filed a similar action in the same court after the House and Senate had passed H.R. 4961. He sued the United States, as well as the same defendants named by petitioners. Representative Paul's case was consolidated with this action in the district court.

[6]The individual and institutional congressional defendants opposed petitioners' suit and were represented by the Senate Legal Counsel and the Counsel to the Clerk of the House of Representatives.

> of any constitutional infirmities in the enactment of TEFRA, and in fact opposes this lawsuit. Judicial interference into this intralegislative dispute is constitutionally precluded.

The district court further concluded that even if petitioners had standing, "the doctrine of equitable discretion announced by [the District of Columbia Circuit] in *Riegle* v. *Federal Open Market Committee* [, 656 F.2d 873 (1981), cert. denied, 454 U.S. 1082 (1981)] squarely governs this action and mandates dismissal." Pet. App. 44a.

The court of appeals unanimously affirmed the judgment, but the members of the panel disagreed on the appropriate rationale. The majority concluded that petitioners had standing (Pet. App. 6a-15a). It variously described the injury they had suffered as "the deprivation of an opportunity to debate and vote on the origination of TEFRA" (*id.* at 9a); "the nullification of their right to originate, by debate and vote, a bill for raising revenue prior to legislative action by the Senate" (*ibid.*); injury to the "rights to participate and vote on legislation in a manner defined by the Constitution" (*ibid.*); injury "by distortion of the process by which a bill becomes law — a process in which a legislator has a right and a duty to participate" (*id.* at 10a); "the deprivation of debate and a vote in the origination of revenue-raising legislation" (*ibid.*); "deprivation of a particular opportunity to vote in a manner prescribed by the Constitution" (*id.* at 11a); and an injury to the "right to participate in a constitutionally prescribed method of enacting revenue-raising legislation" (*id.* at 15a). The majority concluded, however, relying on *Riegle*, that separation of powers concerns warranted the district court's exercise of "remedial discretion" (*id.* at 15a) to deny relief. *Id.* at 15a-20a. The majority explained that petitioners' "dispute over

the origination of TEFRA is primarily a controversy with other members of Congress" and that litigation like petitioners' suit "pose[s] a real danger of misuse of the courts by members of Congress whose actual dispute is with their fellow legislators" (*id.* at 19a).

In a separate concurrence, Judge Scalia criticized the majority's reliance on the doctrine of "remedial discretion" (Pet. App. 30a-37a) and urged that petitioners lack standing (*id.* at 29a-30a). He reasoned as follows (*id.* at 25a-26a):

> The [correct] test of congressional standing * * * must take as its point of departure the principle that we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings, or the resolution of those inter-branch disputes through the system of checks and balances * * * brings forth a result that harms private rights, it is no part of our constitutional province * * *.
>
> In my view no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest.

ARGUMENT

1. This case is indistinguishable from *Riegle* v. *Federal Open Market Committee,* cert. denied, 454 U.S. 1082 (1981), and the Court should deny review for the reasons stated in our brief in opposition in that case.[7] The plaintiff

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[7]We have sent a copy of that brief (No. 81-398) to counsel for the other parties. This Court has consistently denied review of similar cases involving legislator standing. See, in addition to *Riegle, Vander Jagt* v. *O'Neill,* cert. denied, No. 82-2001 (Oct. 3, 1983); *Crockett* v. *Reagan,* cert. denied, No. 83-1398 (June 18, 1984).

in *Riegle*, a United States Senator, claimed that an Act of Congress violated the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. As we explained in our brief in opposition in *Riegle*, the Appointments Clause does not protect the interests of individual Senators; it protects the prerogatives of the Senate as a whole. Senator Riegle could not claim to be representing the Senate as a body, because the Senate had passed the legislation he was challenging. Accordingly, he had failed to allege a "distinct and palpable injury to himself" (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)) that was even "arguably within the zone of interests * * * protected" by the Appointments Clause (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)). See also *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12-13; *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 475 (1982).

Petitioners' claim was correctly dismissed for the same reasons. The Origination Clause does not confer powers or rights on individual Representatives; rather, it establishes a prerogative of the House of Representatives as a body. Consequently, petitioners cannot show that any constitutionally protected interest they possess as individual Representatives was invaded. Indeed, both petitioners and the court of appeals had difficulty in even articulating the individual interest that was allegedly at stake; they were able to provide only vague and abstract formulations of the injury they had suffered. See page 7, *supra*. See also Pet. 8 (petitioners "have suffered an injury to their constitutionally-given duty to debate and vote on the origination of a bill for raising revenue."). Petitioners were of course never denied the right to vote or to participate in the legislative process

by debate or in any other way.[8] These various formulations amount to no more than the assertion that —in the court of appeals' words — petitioners had a "right to participate in a constitutionally-prescribed method of enacting * * * legislation" (Pet. App. 15a). But this interest, like " 'the generalized interest of all citizens in constitutional governance' " (*Valley Forge,* 454 U.S. at 483, quoting *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 217 (1974)), is plainly insufficient to support standing.

A violation of the Origination Clause might be said to injure the interests of the House of Representatives as an institution, but — even assuming that such an injury would be judicially cognizable — the House made it abundantly clear, in its repeated rejection of petitioners' legislative efforts, that it did not object to TEFRA on Origination Clause grounds. Petitioners do not suggest that the House authorized them to sue on its behalf; in fact, petitioners' suit was brought against various representatives of the House as an institution. The House has not supported petitioners' suit at any time during these proceedings.[9]

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[8]In any event, neither the Constitution nor any statute guarantees members of Congress the right to participate in debates or in committee consideration of proposed legislation; the House is free to proceed without debate or reference of a bill to committee if it chooses to do so. Petitioners' suggestion (Pet. 8) that the contents of the bill that became TEFRA would have been different if it had undergone a different form of legislative consideration does not identify an injury to a protected interest of petitioners and, in any event, is too "conjectural" to support standing (*Warth,* 422 U.S. at 504-507, 509).

[9]Moreover, the House is able to protect its interests under the Origination Clause by simply refusing to pass legislation that it believes improperly originated in the Senate—something it declined to do here despite petitioners' urgings.

Petitioners contend that denying them standing for this reason is tantamount to saying that "Congress may waive a * * * constitutional command" (Pet. 7). But there is no more of a "waiver" involved here than there is whenever the only party who arguably has standing chooses not to assert his rights in court. As this Court has recently reiterated, " '[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute' " (*Allen*, slip op. 12, quoting *Warth*, 422 U.S. at 498). Because petitioners cannot show that they have suffered a cognizable injury to a legally protected interest, they are not entitled to a resolution of their claim on the merits. The House as an institution, which may or may not be entitled to a judicial resolution of this issue, has not sought one.

2. We do not necessarily disagree with petitioners' criticisms of the District of Columbia Circuit's doctrine of "equitable discretion" or "remedial discretion"; we expressed our reservations about that doctrine in our brief in opposition in *Riegle* (at 7-9) and in our brief in the court of appeals in this case (at 10-12). But as we noted in our brief in opposition in *Riegle*, many of the overlapping notions associated with the concept of justiciability can legitimately play a role in expressing the separation of powers concerns to which a suit like petitioners' gives rise. As we also explained in that brief, the District of Columbia Circuit has achieved an underlying consistency of results in its approach to suits by Members of Congress; it has entertained claims only when a specific legislative enactment was nullified by executive action.[10] The result in this case is consistent with that

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[10]Recently, in *Barnes* v. *Kline*, No. 84-5755 (D.C. Cir. Aug. 29, 1984), petition for rehearing pending, a divided panel of the District of Columbia Circuit issued an order upholding on the merits the claims of certain members of Congress and individuals purporting to represent the Houses of Congress that the President's pocket veto of a bill passed by Congress was ineffective. The court of appeals' opinion in *Barnes* has

pattern. Moreover, as Judge Scalia's concurring opinion shows, the doctrine of equitable discretion is not considered settled law by all members of the court of appeals and may well be reexamined at some point in the future. See also *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1185 (D.C. Cir. 1983) (Bork, J., concurring), cert. denied, No. 82-2001 (Oct. 3, 1983).[11] In these circumstances, the fact that the court of appeals has chosen a questionable doctrinal rationale for its correct decision not to entertain petitioners' claim on the merits is not a sufficient reason for this Court to intervene.

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not yet been released. But it seems unlikely that *Barnes* marks a departure from the prior course of decisions on congressional standing in the District of Columbia Circuit; as we noted in our brief in opposition in *Riegle*, the only other case even remotely resembling petitioners' in which that court has conferred standing on a Member of Congress is *Kennedy* v. *Sampson*, 511 F.2d 430 (1974), which also involved a challenge to a purported pocket veto. Moreover, the suit in *Barnes* — unlike petitioners' suit — was brought not just by individual Members but by the Speaker of the House and the Senate Legal Counsel, who claimed to represent their respective Houses of Congress. The court of appeals might have reached the merits on the basis of a conclusion that the Speaker and the Senate Legal Counsel had standing even though the individual Members did not.

[11]In addition, the conclusion by the majority of the court below that petitioners have standing was based primarily on its belief that what it described as "the separation-of-powers concerns presented by this case" are properly viewed not as affecting petitioners' standing but as "affect-[ing] the proper exercise of judicial discretion to grant or withhold declaratory relief" (Pet. App. 15a). After the court of appeals' opinion was issued, this Court made clear that separation of powers concerns are a critical underpinning of the standing doctrine. *Allen*, slip op. 12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT E. KOPP
LEONARD SCHAITMAN
DOUGLAS LETTER
Attorneys

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